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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1964

No. 537

REYNOLDS METALS COMPANY, *Appellant,*

v.

THE STATE OF WASHINGTON, *et al.*, *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM FROM STATE COURT FOR WANT OF SUBSTANTIAL FEDERAL QUESTION

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INDEX

		Page
I	THE STATUTES INVOLVED AND THE NATURE OF THE CASE	6
	A The Statutes	6
	B Question Presented	7
II	COUNTERSTATEMENT OF THE CASE	8
III	ARGUMENT	9
IV	CONCLUSION	13

TABLE OF CASES

J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) 9

Federal Power Com. v. Union Electric Co., 14 L. ed.2d 239 (1965) 10

Field Enterprises, Inc. v. State, 47 Wn.2d 852, 289 P.2d 1010 (1955, aff. per curiam), 352 U.S. 806 (1956) 12

General Motors Corp. v. Washington, 377 U.S. 436 (1964) 11, 12

International Harvester Co. v. Evatt, 329 U.S. 416 (1947) 9

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 10

Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) 10

Wickard v. Filburn, 317 U.S. 111 (1942) 10

STATUTES

Revised Code of Washington

RCW, Chapter 82.04 6

RCW 82.04.110 6

RCW 82.04.120 6

RCW 82.04.220 6

RCW 82.04.240 7

RCW 82.04.440 12

FEDERAL CONSTITUTION

Commerce Clause 8, 9, 12

Fourteenth Amendment 8, 9, 11, 12

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The appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Washington on the ground that is manifest that the questions on which a decision of the cause depends are so unsubstantial as not to need further argument.

I

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A

THE STATUTES

This appeal raises the question as to the validity of certain provisions of the Washington business and occupation tax (chapter 82.04 of the Revised Code of Washington, as amended).

RCW 82.04.220 identifies the legal incidence of tax involved here as a "* * * tax for the act or privilege of engaging in business activities. * * *"[1]

The "measure" of the tax involved here is defined in the second sentence of RCW 82.04.220, *supra*, as the product of the "* * * rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be." (RCW 82.04.220, *supra*.)

This appeal involves one classification within the aforementioned tax: "Manufacturing." A "manufacturer" (RCW 82.04.110) and "To Manufacture" (RCW 82.04.120) are defined to include any person and embraces "* * * all activities of a commercial or industrial nature wherein labor

[1]The complete text of section 82.04.220 of the Revised Code of Washington provides: "There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be."

or skill is applied, by hand or machinery, to material so that as a result thereof a new, different or useful substance or article of tangible personal property is produced for sale or commercial or industrial use, * * *" "Upon every person * * * engaging within this state in business as a manufacturer, as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, manufactured, multiplied by the rate of one-quarter of one percent.

"The measure of the tax is the value of the products, including byproducts, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state." (RCW 82.04.240.)

B

Question Presented

The statement of the appellant (pp. 3 and 4) lists five numbered questions as presented by its appeal. Besides being argumentative in nature, these numbered questions are based on obviously false assumptions that Washington's manufacturing tax is imposed on out-of-state activities of the appellant. This, of course, is not true. We suggest, therefore, that this Court will be guided by a simpler and more precise statement of the only two questions presented. These are:

1. Can a state tax a person engaging in business as a manufacturer within the state and measure the

amount of such tax by the value of the goods manufactured and not offend the Fourteenth Amendment or the Commerce Clause of the Federal Constitution?

2. Can a state exempt a manufacturer who is subject to and pays a tax under another classification of the same tax on account of its subsequent activities within the state and not offend the Fourteenth Amendment or the Commerce Clause of the Federal Constitution?

II

COUNTERSTATEMENT OF THE CASE

This counterstatement set forth hereinafter is offered by appellees for the purpose of showing the activities of the appellant within the state upon which the tax was levied.

The appellant operates a plant at Longview, Washington, where aluminum metal is produced by the reduction of alumina into aluminum by an electrolysis process. This is an immense industrial plant which necessitated initially an expenditure by the appellant of over $15,000,000.00 in plant facilities. Its operation necessitates the employment of a work force in excess of five hundred men and necessitates the availability of a constant and economical source of electrical energy to produce aluminum metals valued in excess of $22,000,000.00 in 1955. (The taxes for the year 1955 were selected by agreement as a representative year to present the questions.) It was upon the aforementioned activities that the

appellant reported and paid, under the manufacturing classification of Washington's business and occupation tax, taxes in the sum of $81,100.57.[2]

III

ARGUMENT

The case presents no substantial question not previously decided by this Court.

1. Can a state tax a person engaging in business as a manufacturer within the state and measure the amount of such tax by the value of the goods manufactured and not offend the Fourteenth Amendment or the Commerce Clause of the Federal Constitution?

Since the case of *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938), it is clear that a state may tax a purely local activity such as manufacturing and measure that tax by the value of the goods manufactured. In *International Harvester Co. v. Evatt*, 329 U.S. 416 (1947), this Court said at page 420:

> "* * * It has long been established that a state can tax the business of manufacturing. The fact that it chose to measure the amount of such a tax by the value of the goods the factory has produced, whether of the current or a past year, does not transform the tax on manufacturers to something else. [Citing cases.]"

The appellant infers in its Statement that the aforementioned cases and those relied upon by the Supreme Court of the State of Washington, par-

[2]Of said $81,100.57, $815.37 represents tax paid on the manufacture of cryolite.

ticularly *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932), are no longer authority for the proposition that manufacturing is purely a local activity and, hence, properly subject to state taxation. Its authority is premised on *Wickard v. Filburn*, 317 U.S. 111 (1942), and *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which hold that although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce to vitally affect it, Congress has the power to exercise control of that intrastate activity. The *Wickard* and *Jones & Laughlin* cases, *supra*, deal with the power of Congress to regulate under the Commerce Clause. They do not affect *one iota* the vitality of the *Utah Power & Light Co. v. Pfost* case, *supra*, and the other authorities cited herein for the proposition that manufacturing is not a part of interstate commerce and the Commerce Clause of the United States Constitution does not prevent the state from taxing the business of manufacturing. The distinction hereinabove referred to was most aptly stated in the recent case of *Federal Power Com. v. Union Electric Co.*, 14 L. ed.2d 239, decided May 3, 1965:

> "Utah Power & Light Co. v. Pfost, 286 US 165, 76 L ed 1038, 52 S Ct 548, cited by the Court of Appeals, is not opposed. The Court there held that a State had power to impose a tax on a company generating electric energy for distribution in interstate commerce. This, of course, does not control the commerce powers

> of Congress. Cf. Edison Co. v. Labor Board, 305 US 197, 83 L ed 126, 59 S Ct 206; Polish Alliance v. Labor Board, 322 US 643, 649, 88 L ed 1509, 1515, 64 S Ct 1196: '[*F*]*ederal regulation does not preclude state taxation and state taxation does not preclude federal regulation.*'" (Emphasis supplied.)

Regarding the appellant's assertion that the tax in question is repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, reference need only be made to the recent decision of this Court arising from this state, *General Motors Corp. v. Washington*, 377 U. S. 436 (1964), and the test stated therein. (This case dealt with the wholesaling classification of Washington's business and occupation tax.)

> "* * * We must determine whether it is so closely related to local activities of the corporation as to form 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' * * *"

The tax in question "manufacturing" unlike "wholesaling" as was involved in the *General Motors* case is not only related to the local activities but comprises the whole activity itself. In other words, Washington and only the State of Washington is at liberty to tax the activity of producing aluminum from alumina since this activity occurred entirely within the State of Washington.

2. Can a state exempt a manufacturer who is subject to and pays a tax under another classification of the same tax on account of its subsequent activities

within the state and not offend the Fourteenth Amendment or the Commerce Clause of the Federal Constitution?

The constitutional validity of Washington's so-called "multiple activities" exemption has been before this Court on more than one occasion.[3] The precise question was presented to this Court in *Field Enterprises, Inc. v. State of Washington.* (Jurisdictional Statement, p. 9: *Field Enterprises, Inc. v. State*, No. 214, October Term, 1956.) This Court rejected the appellant's argument per curiam, affirming the opinion of the Washington State Supreme Court sustaining the Washington tax. 47 Wn. 2d 852, 289 P. 2d 1010 (1955), aff. per curiam, 352 U.S. 806 (1956).

This question was again presented and rejected on the merits in the recent case of *General Motors v. State, supra.* Not only was it rejected but it was subject to extensive discussion in Justice Goldberg's dissenting opinion (pp. 445-447). Significantly, however, the doubts expressed by Justice Goldberg applied to an out-of-state manufacturer-seller who had to compete with Washington manufacturers-sellers, not an *instate* manufacturer such as appel-

[3]The complete text of RCW 82.04.440, Washington's "multiple activities" exemption provides: "Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in: *Provided*, That persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240 or subsection (2) or (3) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold, and that persons taxable under RCW 82.04.240 shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured."

lant. In other words, under the views expressed by Justice Goldberg, the appellant is the beneficiary of any duplicative tax and corresponding competitive disadvantage that an out-of-state manufacturer-seller may be exposed to. Thus the advantage that may accrue to the appellant under Washington's "multiple activities" exemption clearly presents no federal question.

IV

CONCLUSION

Wherefore, appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument, and appellees move the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of the State of Washington.

Respectfully submitted,

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